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No. 84-1650

In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TENNESSEE, ETC., PETITIONER

v.

ELIZABETH H. DOLE, SECRETARY
OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary of Transportation is authorized to make adjustments in federal payments to the State of Tennessee under the Federal-Aid Highway Act (23 U.S.C. 101 *et seq.*) to reflect the fact that the highway construction costs for which federal funds were previously expended had been inflated due to bid rigging by contractors and the State had recovered such overcharges from the contractors.

2. Whether equitable estoppel bars the Secretary's proposed adjustments.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 749 F.2d 331. The opinion of the district court (Pet. App. A14-A49) is reported at 567 F. Supp. 704.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on November 29, 1984. A petition

for rehearing was denied on January 21, 1985 (Pet. App. A13). The petition for a writ of certiorari was filed on April 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal-Aid Highway Act of 1956, as amended (23 U.S.C. 101 *et seq.*), provides extensive federal financial assistance to states for construction of a nationally linked road network. See 23 U.S.C. 101. Under the Act, the federal government pays statutorily designated shares (usually 75 or 90%) of construction costs on federally approved state highway building projects. See 23 U.S.C. 105, 120. This federal aid system is administered by respondent Secretary of Transportation, who is responsible for apportioning among the states, according to a statutory formula, funds appropriated by Congress for highway construction. When a state's proposed highway project is approved by the Secretary, the state and the federal government enter into a contract in which the federal government agrees to pay the percentage of the construction costs specified in the Act and the state agrees to pay the remaining costs and to maintain the highway thereafter. See 23 U.S.C. 110. After the project is approved, the state may contract, through competitive bidding, with private construction companies to build the road. See 23 U.S.C. 112.

2. Beginning in 1979, the federal government brought a series of prosecutions against Tennessee construction firms for collusive bidding on federally assisted highway projects. After the government obtained more than 70 convictions in these cases, petitioner began civil investigations into bid rigging. These investigations resulted in settlements with a

number of bid riggers who agreed to pay back to petitioner approximately $12 million in overcharges stemming from collusive bidding.

In October 1981, the Secretary requested that petitioner provide data concerning these settlements in order to determine the amount of the recovered overcharges that represented federal assistance. The Secretary explained that, because the Federal-Aid Highway Act limits federal payment to a set percentage of legitimate construction costs, the federal amounts had to be recomputed in light of the recovered overcharges. Without such an adjustment, petitioner would have received double payment—once by the federal government under the Federal-Aid Highway Act and once by the bid riggers who repaid petitioner for the excessive charges. The Secretary indicated, however, that the federal funds in question would be made immediately available for use by petitioner for other federally approved road construction projects.

Petitioner declined to provide the requested information. It contended that the federal highway money was a gift over which the Secretary had lost all control and that, once the federal money had been recovered from bid riggers, it could be spent in any way the State chose.

In view of petitioner's refusal to furnish any data, the Secretary made an accounting using other sources of information and concluded that, taking into consideration the amounts petitioner had expended in obtaining the recoveries from the bid riggers, $4.5 million was attributable to financial assistance provided by the federal government.[1]

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[1] The basis for the Secretary's proposed adjustment was the actual amount of federal assistance, not treble damages

3. Petitioner then filed this suit in the United States District Court for the Middle District of Tennessee. It sought an injunction to prevent the Secretary from taking any action to recoup the federal share of the recoveries. The district court granted the injunction, holding that, once the highway funds were allocated to Tennessee, they constituted a gift to the State and became solely state funds in which the federal government had no interest. In the alternative, the district court held that the Secretary was equitably estopped from making any adjustment because the Assistant Attorney General in the Antitrust Division of the Department of Justice had told petitioner that the United States had no interest in petitioner's efforts to recover the overcharges. Pet. App. A14-A49.

4. The court of appeals reversed (Pet. App. A1-A12). It held as a matter of federal common law that the Secretary is entitled to restitution of federal grant monies under a standard of unjust enrichment; accordingly, it remanded the case to the district court to determine the amount involved in light of "the equities of the situation" and the efforts of petitioner to obtain the antitrust recoveries (*id.* at A11). The court of appeals also concluded that the doctrine of equitable estoppel does not bar the Secretary's proposed action because the statement by the Assistant Attorney General for Antitrust did not apply to adjustments under the Federal-Aid Highway Act and because in any event the only detriment suffered by petitioner was its " 'inability to retain money that it

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under the antitrust laws. In this case it appears that petitioner's settlements with the bid-rigging defendants were based on single rather than treble damages (see C.A. App. 21, 86).

should never have received in the first place' " (*id.* at A12, quoting *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984), slip op. 9).

ARGUMENT

Petitioner contends that the court of appeals erred in holding that it was unjustly enriched when it refused to account to the federal government for a share of the amounts it had recovered from bid riggers on federally assisted highway projects. However, that decision is correct and does not conflict with the decisions of this Court or any other court of appeals. While we do not agree with all of the court of appeals' reasoning,[2] petitioner is not entitled to judgment, and further review by this Court is not warranted.

1. At the outset, we note that the court of appeals has remanded the matter to the district court and thus the case is currently in an interlocutory posture. The court of appeals' decision leaves petitioner in precisely the same position it would have occupied if the district court in the first instance had held that the Secretary was entitled to take account of the recovery of the bid-rigging overcharges and had sched-

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[2] The government argued below that this case was in the nature of a contract dispute involving a claim in excess of $10,000 and therefore was within the exclusive jurisdiction of the Claims Court. See 28 U.S.C. 1346(a)(2) and 1491(a)(1); *Portsmouth Redevelopment & Housing Authority* v. *Pierce*, 706 F.2d 471 (4th Cir. 1983), cert. denied, No. 83-90 (Nov. 7, 1983); *Massachusetts* v. *Connor*, 248 F. Supp. 656 (D. Mass.), aff'd, 366 F.2d 778 (1st Cir. 1966). Both courts below rejected this argument and held that the district court had jurisdiction (Pet. App. A6-A9, A15). We have not sought this Court's review of the jurisdictional issue.

uled further proceedings to determine the exact amount involved. In that circumstance, petitioner could not seek review of the rejection of its contention that no adjustment by the Secretary would be permissible. Review of the instant petition would likewise be premature. Following the ultimate disposition of the entire case in the lower courts, petitioner will be able to present to this Court the contentions it now raises, together with any other claims it may have, in a petition for a writ of certiorari to review the final judgment.

2. In any event, the decision of the court of appeals is correct and does not call for this Court's review. The Federal-Aid Highway Act explicitly limits the federal share of construction costs on a highway project. See 23 U.S.C. 120. In this instance, federal money was mistakenly paid out to petitioner on the basis of erroneous cost figures that were inflated because of bid rigging. Once the bid rigging was discovered by the federal government and the overcharges refunded to petitioner by the bid riggers, a new accounting was necessary to determine the proper statutory federal share of the correct costs. In the absence of the proposed adjustments, the federal share of the revised costs of the construction projects would exceed the allowable percentages set by Congress in the Act.

The Secretary's proposed action would return petitioner to the position it would have been in if the illegal bid rigging had never occurred. Under the adjustments that petitioner contests, the federal assistance at issue would be available to petitioner for use in future federally-approved highway construction projects; even after the Secretary makes the nec-

essary correction, petitioner will receive its full statutory allocation of federal highway funds. Accordingly, the only dispute in this case between the Secretary and petitioner is whether the funds in question will be used by the State for purposes contemplated by the Federal-Aid Highway Act, as the Secretary contends, or whether it will inure to the State without restriction for any use—including non-road construction use—that the State chooses. Clearly the former position is correct and more in accord with the congressional purpose behind federal financial assistance under the Federal-Aid Highway Act. Even the district court, in holding in petitioner's favor, nonetheless observed that petitioner "has used its recoveries from the bid-riggers for non-Highway Act purposes. * * * To that extent, the State has clearly diverted Highway Act funds for purposes other than those outlined in the Highway Act. This [c]ourt disapproves of * * * [such uses] of recovered Highway Act funds for purposes inconsistent with the Highway Act" (Pet. App. A40).

As the court of appeals noted (Pet. App. A10), this Court has long recognized that federal officials can utilize set-off procedures to recover federal money erroneously paid out. See, *e.g.*, *Grand Trunk W. Ry.* v. *United States*, 252 U.S. 112 (1920). This power has also been consistently recognized by the courts of appeals. See, *e.g.*, *Pennsylvania Department of Transportation* v. *United States*, 643 F.2d 758 (Ct. Cl.), cert. denied, 454 U.S. 826 (1981); *Collins* v. *Donovan*, 661 F.2d 705, 708 (8th Cir. 1981); *Mount Sinai Hospital* v. *Weinberger*, 517 F.2d 329, 337 (5th Cir. 1975), cert. denied, 425 U.S. 935 (1976). In addition, this Court and the courts of appeals have found a common law right of the United States to

recover funds mistakenly paid, and this non-statutory right exists unless Congress clearly manifests an intent by statute to bar such a recovery. See *United States* v. *Wurts*, 303 U.S. 414, 416 (1938); *Grand Trunk W. Ry.* v. *United States*, 252 U.S. at 121; *West Virginia* v. *Secretary of Education*, 667 F.2d 417, 419 (4th Cir. 1981); *Jacquet* v. *Westerfield*, 569 F.2d 1339, 1342 (5th Cir. 1978).

In light of these settled principles, the court of appeals correctly rejected petitioner's argument that the federal government has no right to recover erroneously paid Federal-Aid Highway Act funds. A contrary decision would mean that petitioner would be entitled in effect to double reimbursement—once from the federal government under the Highway Act and once from the bid riggers under the antitrust laws—that would confer upon it a windfall amount in excess of the actual, legitimate cost of the road construction.[3]

Nor, contrary to petitioner's contention, is the ruling below in conflict with *United States* v. *Azzarelli Construction Co.*, 647 F.2d 757 (7th Cir. 1981). In *Azzarelli*, the United States sought double damages and forfeiture from an individual contractor under the False Claims Act (31 U.S.C. (1976 ed.) 231 *et seq.*, now codified at 31 U.S.C. 3729 *et seq.*) for bid rigging on a construction project funded pursuant to the Federal-Aid Highway Act. The court of appeals

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[3] Petitioner's suggestion (Pet. 8-10) that its position is supported by considerations of equity is not only incorrect (see pages 6-7, *supra*) but would not in any event undermine the Secretary's legal authority to take account of petitioner's recovery for the construction overcharges. See *Bennett* v. *New Jersey*, No. 83-2064 (Mar. 19, 1985), slip op. 13-14; *Bennett* v. *Kentucky*, No. 83-1798 (Mar. 19, 1985), slip op. 5-8; *Bell* v. *New Jersey*, 461 U.S. 773, 790-791 (1983).

held that the United States had no cause of action under the False Claims Act because, in light of the fact that the federal government paid a fixed amount to the state for road construction, there was no injury to the funds or property of the United States as required under that Act. As the court explained (647 F.2d at 761-762 & n.5):

> [The funding mechanism of the Federal-Aid Highway Act] operated to insulate the United States from any overcharges. Although the overcharge may have increased the contribution of the United States toward the two particular projects, it did not affect the Government's overall contribution to Illinois.
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> * * * * *
>
> [In this situation, there is an] absence of any injury sufficient under the False Claims Act.[5]

[5] In an attempt to meet the injury requirement, the Government argues in its brief that the United States was injured because fewer highway miles were constructed because of the overcharge. Such an "injury" is not alleged in the complaint and, if in fact such a shortfall occurred, this would not be an injury to the money or property of the United States within the meaning of the False Claims Act.

Whatever the correctness of *Azzarelli* concerning the type of injury necessary to sustain a False Claims Act action against a contractor, it is not inconsistent with the court of appeals' decision in this case. The adjustment sought here by the Secretary is designed to enforce the State's compliance with the terms of the Federal-Aid Highway Act and does not depend upon a showing of injury to the money or property of the United States. Under the principles discussed

above, it is sufficient that federal funds were paid out in a manner inconsistent with the highway program.[4] This is an adequate basis for the Secretary to make appropriate adjustments to ensure that the federal portion of the overcharges recovered by petitioner is used for the federal-aid highway program as Congress intended and not, as petitioner seeks, for other purposes. In contrast, the False Claims Act suit in *Azzarelli* was brought against a third-party contractor rather than against a federal grantee and involved allegedly fraudulent acts harmful to the money or property of the United States rather than the regulatory requirements of a federal aid program. Accordingly, nothing in *Azzarelli* governs the issue in this case or conflicts with the decision below.[5]

3. Petitioner also incorrectly argues (Pet. 11-12) that the Secretary is equitably estopped from making any adjustment to reflect petitioner's recovery of the overcharges. This argument rests on the statement of the Assistant Attorney General for Antitrust that "his office 'had no interest in Tennessee's efforts to recover any over charges due to bid rigging on federal highway construction projects' and that Tennessee's efforts to recover 'were matters for the State

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[4] As petitioner acknowledges (Pet. 4), the effect of the bid rigging in Tennessee was that fewer miles of road were built with the federal funds provided.

[5] Petitioner also contends (Pet. 10) that the federal government's sole remedy was to bring its own civil antitrust action against the bid riggers. Even assuming that such an action would lie (but see *Azzarelli*, 647 F.2d at 758 n.1, 761), that right to redress for antitrust injury does not detract from the government's separate right, which is at issue here, to ensure that federal grants are properly spent for their intended purpose.

and its officials' " (Pet. App. A3). As the Assistant Attorney General explained (*id.* at A17), "in 1980 the Division's position was 'that only the State was injured in its property by reason of bid-rigging on such highway construction projects and that the United States had no legal claim or interest in such recoveries under the federal antitrust laws.' "

Even assuming that the doctrine of equitable estoppel applies against the government, it would not bar the Secretary's action in the circumstances of this case. First, fairly read in context, the above statements of the Assistant Attorney General clearly cannot be understood to exempt petitioner's overcharge recoveries from any interest of the federal government under the entire United States Code; rather, those statements indicate only that the Antitrust Division would not, under the antitrust laws, assert a claim to petitioner's recoveries based on competitive injury from illegal bid-rigging.[6] Moreover, to the extent petitioner took the statements more broadly, it did not rely on them to its detriment; instead, as the court of appeals observed, "the only 'detriment' to [petitioner as] the party asserting estoppel against the government is simply its 'inability to retain money that it should never have received in the first place' " and that it seeks to use for purposes unrelated to the Federal-Aid Highway Act (Pet. App. A12, quoting *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984), slip op. 9).[7] In light of

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[6] Furthermore, the Assistant Attorney General specifically explained to petitioner that his statement "was, of course, subject to change and I could in no way bind future administrations" (C.A. App. 148).

[7] In fact, it is doubtful that petitioner relied on those statements at all, since many of the settlements—all of which

these two factors, estoppel would not lie against a private party and therefore is necessarily unavailable against the government. See *Heckler* v. *Community Health Services*, slip op. 9, 14. Finally, any inconsistency between the cited statements and the Secretary's proposed action in this case would not constitute "affirmative misconduct" that is the precondition for a claim of estoppel against the government (see, *e.g.*, *Schweiker* v. *Hansen*, 450 U.S. 785, 788-790 (1981)); at most, petitioner has charged that the government departed from the previous position of one of its officials, which plainly falls far short of the required element of affirmative misconduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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used a standard form—were reached before petitioner's meeting with the Assistant Attorney General. See, *e.g.*, C.A. App. 22.

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